

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

MICHAEL TRAVIS HINKLE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 5:10-1086
)	
VICKI GREENE, et al.,)	
)	
Defendants.)	

AMENDED PROPOSED FINDINGS AND RECOMMENDATION

On September 10, 2010, Plaintiff, acting *pro se* and incarcerated at the Southern Regional Jail, in Beaver, West Virginia, filed his Application to Proceed Without Prepayment of Fees and Complaint claiming entitlement to relief pursuant to 42 U.S.C. § 1983.¹ (Document Nos. 1 and 2.) In his Complaint, Plaintiff names the following as Defendants: (1) Vicki Greene, Administrator; (2) Larry Bunting, Lieutenant; and (3) Joel Ramsey, Correctional Officer. (Document No. 1, p. 4.) Plaintiff complains that Defendants violated his constitutional rights by using excessive force, denying him adequate medical care, and preventing him from retrieving his “special drinking cup.” (*Id.*, pp. 4 - 8.) In support, Plaintiff explains that he “is a 32 year old male with a life long case of cerebral palsy.” (*Id.*, p. 4.) Plaintiff states that “[a]s a result of his cerebral palsy he needs special items in order to function in everyday life, which Defendant Lt. L. Bunting has approved for the Plaintiff to have at the facility.” (*Id.*) Plaintiff alleges that he “forgot his special drinking cup in the laundry room” on June 25, 2010. (*Id.*, p. 5.) Plaintiff claims that “when [he] noticed he had forgot his cup, he turned to let Defendant Ramsey know and Mr. Ramsey refused to allow him to go

¹ Because Plaintiff is acting *pro se*, the documents which he has filed in this case are held to a less stringent standard than if they were prepared by a lawyer and therefore, they are construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

retrieve it.” (Id.) Plaintiff complains that when he “started explaining the reason he needed the cup, Defendant Ramsey started pushing the Plaintiff toward gate 3.” (Id.) Plaintiff asserts that “[o]nce Defendant had the Plaintiff at the gate, he placed his hands around the Plaintiff’s neck lifting the Plaintiff out of his shoes while restraining him against the gate.” (Id.) Plaintiff contends that when the gate opened, “Ramsey took the Plaintiff by the arm, placing a hand also on the back of the Plaintiff’s neck, and pushed him to a non-contact visitation room so hard he left a hand print on the Plaintiff’s neck.” (Id., p. 6.) Plaintiff claims that Defendant Ramsey “threw the Plaintiff in the visitation room making him fall into a concrete table in the room.” (Id.) Plaintiff states that “after the rest of the kitchen crew was stripped out,” Defendant Ramsey took Plaintiff “to see the nurse for his neck at the Plaintiff’s request.” (Id.) Plaintiff acknowledges that the “nurse, Mrs. Prince, accessed the Plaintiff and gave him some medication for his neck.” (Id.) Plaintiff complains that he was then questioned by the Shift Supervisor, Corporal Vandall, concerning the incident. (Id., pp. 6 - 7.) Plaintiff alleges that Corporal Vandall informed “Plaintiff that he would not get a write-up or lose his job if he let the incident die and not pursue it legally.” (Id., p. 7.) Plaintiff states that he “was then escorted back to his housing unit where he learned the next day that he had in fact lost his job and was going to receive two write-ups.” (Id.) Plaintiff alleges that he “received ten days segregation for his write-ups.” (Id.) Plaintiff claims that he “requested numerous times over the next two weeks for medical attention for his neck, but never got it.” (Id.) Based on the foregoing, Plaintiff contends that Defendants violated his constitutional rights by using excessive force, terminating his job, placing him in segregation for his write-ups, and denying him appropriate medical care. (Id., p. 8.) Plaintiff further contends that Defendant Ramsey violated the Americans with Disabilities Act by refusing to allow Plaintiff to retrieve his “special drinking cup.” (Id.) Plaintiff requests monetary and injunctive relief. (Id., pp. 9 - 10.)

By Proposed Findings and Recommendation entered on June 12, 2013, the undersigned recommended that Plaintiff's Complaint be dismissed based upon his failure to exhaust the administrative remedies provided under the West Virginia Division of Corrections' Policy Directive 335.00 prior to filing his Complaint. (Document No. 19.) On July 1, 2013, Plaintiff filed his Objections stating that he was an inmate at the Southern Regional Jail at the time of the incident and therefore was not governed by the administrative remedy procedures set forth by the West Virginia Division of Corrections' Policy Directive 335.00. (Document No. 21.) Plaintiff correctly states that he was governed by the grievance procedures set forth by the West Virginia Regional Jail Authority. Therefore, the Court will consider whether Plaintiff has appropriately exhausted his remedies pursuant to the policies of the West Virginia Regional Jail Authority.

STANDARD

Pursuant to 28 U.S.C. § 1915A, the Court is required to screen each case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. On screening, the Court must recommend dismissal of the case if the complaint is frivolous, malicious or fails to state a claim upon which relief can be granted. A "frivolous" complaint is one which is based upon an indisputably meritless legal theory. Denton v. Hernandez, 504 U.S. 25, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992). A "frivolous" claim lacks "an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 1831 - 32, 104 L.Ed.2d 338 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." Id., 490 U.S. at 327, 109 S.Ct. at 1833. A claim lacks an arguable basis in fact when it describes "fantastic or delusional scenarios." Id., 490 U.S. at 327 - 328, 109 S.Ct. at 1833. A complaint therefore fails to state a claim upon which relief can be granted factually when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. With

these standards in mind, the Court will assess Plaintiff's allegations in view of applicable law.

DISCUSSION

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)(1996), requires that inmates exhaust available administrative remedies prior to filing civil actions though the administrative process may not afford them the relief they might obtain through civil proceedings.² Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378, 2382-83, 165 L.Ed.2d 368 (2006); Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)(The Prison Litigation Reform Act's exhaustion requirement applies to all inmate suits about prison life whether they involve general circumstances or particular episodes and whether they allege excessive force or some other wrong.); Booth v. Churner, 532 U.S. 731, 121 S.Ct. 1819, 1820, 149 L.Ed.2d 958 (2001)(“Under 42 U.S.C. § 1997e(a), an inmate seeking only money damages must complete any prison administrative process capable of addressing the inmate's complaint and providing some form of relief, even if the process does not make specific provision for monetary relief.”). Exhaustion of administrative remedies is also required when injunctive relief is requested. Goist v. U.S. Bureau of Prisons, 2002 WL 32079467, *4, fn.1 (D.S.C. Sep 25, 2002), *aff'd*, 54 Fed.Appx. 159 (4th Cir. 2003), *cert. denied*, 538 U.S. 1047, 123 S.Ct. 2111, 155 L.Ed.2d 1088 (2003). “[T]here is no futility exception to the PLRA's exhaustion requirement.” Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). But the plain language of the statute requires that only “available” administrative remedies be exhausted. A grievance procedure is not “available” if prison officials prevent an inmate from using it. Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004);

² 42 U.S.C. § 1997e(a) provides as follows:

No action shall be brought with respect to prison conditions under section 1983 of this title or any other federal law, by a prisoner confined in any jail, prison, or other correction facility until such administrative remedies as are available are exhausted.

Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003)(inmate lacked available administrative remedies for exhaustion purposes where inmate was unable to file a grievance because prison officials refused to provide him with the necessary grievance forms); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001)(allegations that prison officials failed to respond to his written requests for grievance forms were sufficient to raise an inference that inmate had exhausted his available administrative remedies.)

If an inmate exhausts administrative remedies with respect to some, but not all, of the claims he raises in a Section 1983, Bivens or FTCA action, the Court must dismiss the unexhausted claims and proceed with the exhausted ones. See Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 913, 166 L.Ed.2d 798 (2007)(“The PLRA does not require dismissal of the entire complaint when a prisoner has failed to exhaust some, but not all, of the claims included in the complaint. * * * If a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad.”) It appears to be the majority view as well that exhausting administrative remedies after a Complaint is filed will not save a case from dismissal. See Neal v. Goord, 267 F.3d 116, 121-22 (2d Cir. 2001)(*overruled on other grounds*), a Section 1983 action, citing numerous cases. The rationale is pragmatic. As the Court stated in Neal, allowing prisoner suits to proceed, so long as the inmate eventually fulfills the exhaustion requirement, undermines Congress’ directive to pursue administrative remedies prior to filing a complaint in federal court. Moreover, if during the pendency of a suit, the administrative process were to produce results benefitting plaintiff, the federal court would have wasted its resources adjudicating claims that could have been resolved within the prison grievance system at the outset. Neal, 267 F.3d at 123. In Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999), the Court stated: “The plain language of the statute [§ 1997e(a)]

makes exhaustion a precondition to filing an action in federal Court... The prisoner, therefore, may not exhaust administrative remedies during the pendency of the federal suit.” Thus, the PLRA requires that available administrative remedies must be exhausted before the filing of a suit in Federal Court. It is further clear that the PLRA does not require that an inmate allege or demonstrate that he has exhausted his administrative remedies. See Jones v. Bock, supra; Anderson v. XYZ Correctional Health Services, 407 F.3d 674, 677 (4th Cir. 2005). Failure to exhaust administrative remedies is an affirmative defense. Prison officials have the burden of proving that the inmate had available remedies which he did not exhaust. See Dale v. Lappin, 376 F.3d 652, 655 (7th Cir. 2004)(“Although exhaustion of administrative remedies is a precondition to a federal prisoner filing a Bivens suit, [citations omitted] failure to exhaust is an affirmative defense that the defendants have the burden of pleading and proving.” (Citations omitted)) The Court is not precluded, however, from considering at the outset whether an inmate has exhausted administrative remedies. The Fourth Circuit stated in Anderson, 470 F.3d at 683, as follows:

[A]n inmate’s failure to exhaust administrative remedies is an affirmative defense to be pleaded and proven by the defendant. That exhaustion is an affirmative defense, however, does not preclude the district court from dismissing a complaint where the failure to exhaust is apparent from the face of the complaint, nor does it preclude the district court from inquiring on its own motion into whether the inmate exhausted all administrative remedies.

The West Virginia Regional Jail Authority makes available to its inmates a grievance procedure through which they may seek review of complaints related to the conditions of their confinement. Under this procedure, inmates must first submit a grievance to the Administrator of the facility in which they are confined. Upon receipt of the grievance, the Administrator may reject the grievance if it appears on its face to have been filed in bad faith, or if other administrative procedures exist that have not been utilized. If the grievance is rejected, the Administrator must

advise the inmate of the rejection. If the grievance is not rejected, the Administrator may assign a staff member to investigate the complaint. Such staff is then required to submit a written report within forty-eight (48) hours. Within two days of receipt of the written report, the Administrator must provide a written decision which identifies the action taken, the reasons for the action, and the procedures that must be followed to properly appeal the decision. If the Administrator's response is unfavorable, the inmate may appeal to the Chief of Operation within five days of the receipt of the Administrator's decision. Upon receipt of an appeal, the Chief of Operations must immediately direct the Administrator to forward copies of all information relating to the inmate's grievance within two business days. The Chief of Operations may direct an investigation of the report be conducted and a written report be submitted within 15 days. Within 10 days of receiving all of the information related to the grievance, the Chief of Operations must provide a written decision which identifies the corrective action taken or the reasons for denying the grievance. If the Chief of Operations' response is unfavorable, the inmate may appeal to the Office of the Executive Director within five days of receipt of the Chief of Operations' response. To do so, the inmate must mail to the Executive Director, copies of the original complaint and all of the responses thereto. The Office of the Executive Director must respond to an inmate's appeal within 10 days of receiving all the information. Unless the inmate has been notified of an extension of time for a response, the inmate may move to the next stage of the grievance process if the inmate does not receive a response at the expiration of the time limit at any stage of the process. The grievance process must be concluded within 60 days, inclusive of any extensions.

In his Complaint, Plaintiff acknowledges that he did not fully exhaust his administrative remedies. (Document No. 1, pp. 3 and 7.) Plaintiff appears to contend that prison staff failed to

properly respond to his administrative remedy request. (*Id.*) Specifically, Plaintiff states that he “filed a grievance to Lt. L. Bunting, [but] it wasn’t answered.” (*Id.*) “Failure to receive a response is not an excuse for not moving to the next level of the grievance procedure.” *Nally v. King*, 2013 WL 594709 * 3 (N.D.W.Va. Jan. 3, 2013); *Cremeans v. Villers*, 2012 WL 2359831 *3 (N.D.W.Va. May 29, 2012). Plaintiff failed to consider any absence of a response as a denial and proceed to the next level. After Defendant Bunting allegedly failed to respond, Plaintiff filed his instant Complaint. Thus, Plaintiff filed his Complaint without first exhausting his administrative remedies pursuant to the PLRA. The undersigned, therefore, recommends that Plaintiff’s Complaint be dismissed in view of his failure to exhaust his administrative remedies.

PROPOSAL AND RECOMMENDATION

Based upon the foregoing, it is therefore respectfully **PROPOSED** that the District Court confirm and accept the foregoing factual findings and legal conclusions and **RECOMMENDED** that the District Court **DENY** Plaintiff’s Application to Proceeding Without Prepayment of Fees (Document No. 1.), **DISMISS** Plaintiff’s Complaint (Document No. 3.) and remove this matter from the Court’s docket.

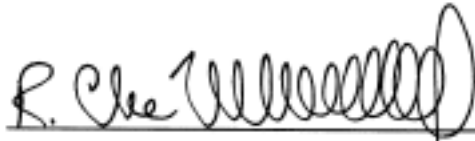
The Plaintiff is hereby notified that this “Proposed Findings and Recommendation” is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge Irene C. Berger. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule 6(e) and 72(b), Federal Rules of Civil Procedure, the Plaintiff shall have seventeen (17) days (fourteen days, filing of objections and three days, mailing/service) from the date of filing of this Findings and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the

basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, District Judge Berger and this Magistrate Judge.

The Clerk is requested to send a copy of this Proposed Findings and Recommendation to Plaintiff, who is acting *pro se*, and transmit a copy to counsel of record.

Date: July 2, 2013.


R. Clarke VanDervort
United States Magistrate Judge